

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWP No. 1054 of 1996

Reserved on: 01.07.2008

Date of decision: 07.07.2008

S.K. Mahajan	... Petitioner
Versus	
Commissioner of Income-tax & Anr.	... Respondent

Coram :

The Hon'ble Mr. Justice Deepak Gupta, Judge.

The Hon'ble Mr. Justice V.K. Ahuja, Judge. Yes.

Whether approved for reporting?¹

For the Petitioner:	Mr. M.M. Khanna, Senior Advocate with Mr. Goverdhan Sharma, Advocate.
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For the respondents:	Mr. Vinay Kuthiala with Ms. Vandana Kuthiala, Advocates.
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Per V.K. Ahuja, J.:

This judgment shall dispose of the writ petition filed by the petitioner under Article 226 of the Constitution of India for issuance of a Writ of Certiorari quashing the order dated 26.9.1995 passed by the respondents praying that penal interest levied be waived under Section 139(B) and Sections 215/217 of Income Tax Act, 1961 and the amount be refunded in favour of the petitioner.

Briefly stated, the facts of the case are that the petitioner is a partner of the firm styled as M/S S.K. Associates. The petitioner filed his return of income amounting to Rs.1,02,230/- for the assessment year 1988-89 with the Assessing Officer, Palampur. The

¹Whether reporters of Local Papers may be allowed to see the judgment? Yes.

petitioner has disclosed that he had income of Rs.1,02,230/- including 30% of share of profit in the firm M/S S.K. Associates of which he was a partner. He filed the return of income in individual capacity as well as on behalf of the firm for the year 1988-89 simultaneously after the petitioner ascertained his share of income from the said firm. It was further alleged that at the time of filing the return by the petitioner, he had alleged that the tax payable on the basis of returns filed by the petitioner be deducted/adjusted out of returnable amounts to the said firm as excess tax stood paid the firm by way of TDS. It was further alleged that the amounts of tax assessed and penal interest levied amounting to Rs.17,600/- and Rs.18,800/- were accordingly adjusted from the refundable amounts of the firm and nothing remained payable as tax or penal interest by the petitioner. It was alleged that late filing of return by the petitioner does not constitute a ground for disentitling an assessee the benefit envisaged under Section 273A. It was alleged that the petitioner has paid all the tax and interest. Consequent upon order passed under the Act, his request for waiving the penal interest imposed did not find favour with the Income Tax Officer, Palampur who vide order dated 2.3.1994 rejected the same. It was alleged that the petitioner filed a petition before respondent No. 1 for waiver of the penal interest who rejected the plea of the petitioner vide his order dated 26.9.1995 on highly irrelevant inadmissible and extraneous conditions and as such, the said orders deserves to be set aside by exercising the writ jurisdiction by this Court.

A notice of the petition was issued to the respondents and the writ petition was admitted.

We have heard learned counsel for the parties and have gone through the record.

During the course of arguments, it was not disputed by the learned counsel for the petitioner that the returns for the firm as well as personal income were filed after the prescribed period. The plea taken by the petitioner was that the personal return was filed after the firm filed its return and his shares were determined as per the return filed by the petitioner's firm. However, the pleadings of the petitioner show that both these returns were filed simultaneously and not after the firm had filed its return as submitted by the learned counsel for the petitioner during the course of arguments. A sum of Rs.40,123/- was due in the name of firm which was adjusted in the account of the petitioner and the petitioner filed an application before the I.T.O. who vide his order Annexure P-2 dated 2.3.1994 rejected the prayer made in this regard.

A perusal of Section 273 of Income Tax 1961 shows that an Assessing Officer can impose a penalty on account of failure to furnish a statement of advance tax which was untrue and has failed to furnish an advance tax payable by him in accordance with the provisions of clause((a) of sub-section (1) of Section 209 A which prescribes that interest can be imposed which shall not be less than 10%.

Rule 117 A provides that the Assessing Officer may reduce or waive the interest payable under Section 139 in the cases and in the circumstances mentioned in the Section. One of the reason is that the assessee had been prevented by sufficient cause from furnishing the return within time. Rule 40 also provides for waiver of interest by the Assessing Officer.

A petition was filed before the Commissioner of Income Tax who vide his order Annexure P-5 dated 26.9.1995 held that the interest charged has already been adjusted against the refund of the firm, there does not seem to be genuine hardship to the assessee since

the assessee does not fulfill all the condition laid down in this regard. Therefore, the petition is rejected.

It is clear from above discussion that the order passed by the I.T.O. had merged in the final order passed by the Commissioner and the Commissioner had the power to waive the penal interest. It is clear that there was delay in filing the return and there is nothing on record to show that the petitioner paid any advance tax at any time and, therefore, the respondents while exercising their powers had held that the petitioner was liable to pay the penal interest which order, prima facie, does not suffer from any illegality. According to Section 273 A(5) no appeal lies against the order passed by the Commissioner. Once no appeal lies against the order, the writ jurisdiction of this Court can be exercised only in case the order suffers from an illegality or is against the principle of natural justice and not otherwise. This Court is not sitting in an appeal to reconsider the order passed by the Commissioner of Income Tax and the writ jurisdiction has to be exercised only in case the order suffers from illegality or was otherwise not sustainable, which is not so the case and as such, there is no merit in the petition filed by the petitioner. The jurisdiction was vested in the Commissioner and the Assessing Officer to waive the penal interest which has not been waived in favour of the petitioner and, therefore, such order does not call for an interference by this Court and as such, there is no merit in the petition filed by the petitioner, which is dismissed accordingly.

**(Deepak Gupta),
Judge.**

**(V.K. Ahuja),
Judge**

**July 07, 2008
(BSS)**
